

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.279 OF 2004

Narayan Ramchandra Barve & Anr. .. Appellant
versus

Shantaram Bapu Barve .. Respondent

...

Mr. Girish Godbole for the appellants.

Ms. Asmita Sali i/b. M.V. Limaye for respondent.

CORAM : D.G. KARNIK, J

DATED :29th September 2006.

P.C:-

1. Heard counsel for the parties.

2. This appeal is directed against the Judgement and Order dated 4th February, 2004 passed by the 4th Additional District Judge, Nashik allowing the appeal and remanding the suit to the trial court for hearing afresh in accordance with the directions contained in the Judgement.

3. Respondent filed a suit against the appellants bearing Regular Civil Suit No.214 of 1997 for a declaration that the sale deed dated 31st October, 1997 executed by the appellant no.1 in favour of the appellant no.2 was illegal, invalid and was not binding on him and for an injunction restraining the appellants from disturbing the joint possession of the respondent. According to the respondent the suit property was jointly owned by him and appellant no.1. However appellant no.1 illegally sold suit property to the appellant no.2 by the sale deed dated 31st October, 1997, without the consent of the respondent. Therefore, he claimed that sale deed was not binding on him. He also claimed that he was in joint possession of the suit property and therefore appellants should not disturb his joint possession of the suit property. After consideration of the evidence adduced by the parties, the trial court dismissed the suit. Aggrieved by the order of dismissal the respondent filed an appeal bearing Civil Appeal No.477 of 2002 in the District Court, Nashik. By an order dated 4th February, 2004 the appellate court allowed the appeal and remanded the suit for re-trial after re-framing the issues as directed by the appellate court in the order. That order is

impugned in this appeal.

4. The trial court initially framed five issues and subsequently framed two additional issues. One of the issues was whether respondent became joint owner of the property under a will dated 20/01/2006 of Parvatabai Ramchandra Barve. Another issue was whether the respondent proved that the sale deed dated 31/10/1997 executed by appellant no.1 in favour of appellant no.2 was illegal, improper and invalid. The trial court did not frame an issue whether respondent was in joint possession of the suit property and was entitled for an injunction to protect his joint possession.

5. It may be noted that the suit was not only for declaration that the sale deed was invalid but was also for an injunction for protecting joint possession of the respondent. In the circumstances, the issue as to whether the respondent proved his joint possession of the suit property, was necessary to decide whether the respondent was entitled to the relief of an injunction. The appellate court, in para 11 of its Judgement, has correctly pointed out that issue whether the respondent was in joint possession of the suit property was necessary but was not framed by the

trial court. The appellate court has also correctly observed that such an issue ought to have been framed with burden of proving the same on the respondent. The appellate court therefore remanded the matter for deciding it as afresh after framing the issue of possession. No error is found in the decision of the appellate court in holding that the issue regarding possession was necessary and remanding the matter to the trial court for deciding afresh after framing of the issues.

6. For these reasons, there is no merit in the appeal, which is hereby dismissed with costs.

(D.G. KARNIK, J.)